

**Proposed Interim Enforcement Policy for
Pilot Program on the Use of Alternative Dispute
Resolution in the Enforcement Program
Request for Comments
(69FR21166)**

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NUCLEAR ENERGY INSTITUTE

Charles M. Dugger
VICE PRESIDENT, NUCLEAR OPERATIONS
NUCLEAR GENERATION DIVISION

May 20, 2004

Ms. Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Mail Stop T-6 D59
Washington, DC 20555-0001

**SUBJECT: Proposed Interim Enforcement Policy for Pilot Program on the Use of
Alternative Dispute Resolution in the Enforcement Program
(69 Fed. Reg. 21166; April 20, 2004)**

Dear Ms. Vietti-Cook:

The Nuclear Energy Institute¹ hereby submits the following comments, on behalf of the commercial nuclear energy industry, in response to the above cited Federal Register notice announcing the implementation of a pilot program on the use of Alternative Dispute Resolution (ADR) in cases involving discrimination or other wrongdoing. The industry fully supports the Commission's decision to implement this pilot program².

As we have stated in previous comments on this issue, the industry believes that instituting an effective ADR program as a component of the NRC's enforcement process should yield many benefits. For example, it should

- provide a less adversarial process for resolving the issues in dispute;

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

² See SRM dated March 31, 2004; Staff Requirements-SECY-04-00440-Proposed Pilot Program for the Use of Alternative Dispute Resolution in the Enforcement Program.

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SECY-02

Ms. Annette Vietti-Cook
May 20, 2004
Page 2

- promote greater communication and, in turn, greater cooperation among the parties, ideally leading to a quicker, more mutually satisfying end result;
- help to minimize the time to obtain a resolution of potentially very contentious issues;
- minimize the need for a large commitment of licensee and staff resources; and
- lead to potentially more effective corrective action if such action is warranted.

In sum, through an ADR process, the parties may be able to more quickly put the dispute behind them and return to productively carrying out their respective professional responsibilities.

With respect to the specific features of the proposed ADR pilot program, the industry believes that the program appropriately makes ADR available for a broad range of alleged discrimination and other wrongdoing cases, and does not limit the choice of neutral or technique used by the chosen neutral. In addition, and as we believe it should, the pilot program offers ADR at an early juncture in a discrimination case and at three points thereafter in both discrimination and other wrongdoing cases. Further, there is a significant incentive to use the ADR pilot program because the Interim Enforcement Policy makes it clear that, if a resolution is agreed to by the parties and favorably reviewed by the NRC, no further NRC enforcement action will be pursued.

Notwithstanding the industry's support for the initiation of the pilot program, and our overall view that it has been constructed to be reasonably well functioning, we recommend that two features of the program be reconsidered after the program has been used for a sufficient period of time to allow the agency to gather meaningful data. The first feature which bears reconsideration relates to the Enforcement Policy's treatment of an ADR settlement as a factor in determining a future civil penalty amount. 69 Fed. Reg. 21171. The second is the issuance of a press release when a settlement is reached through ADR after the conclusion of an OI investigation. *Id.*

Section IV. A. of the Enforcement Policy, which discusses enforcement history as a factor in determining a future civil penalty, states

"if the staff considers a civil penalty for a future escalated enforcement action, settlements under the enforcement ADR program occurring after a formal enforcement action is taken (e.g., an NOV is issued) will count as an enforcement case for purposes of determining whether identification credit is considered. *Id.* (emphasis added).

Ms. Annette Vietti-Cook

May 20, 2004

Page 3

Given the Enforcement Policy's general recognition of the value of settlements, and the fact that the NRC has stated that it wishes to encourage use of the ADR process at various stages of the enforcement process to obtain settlements, the NRC should consider taking precisely the opposite approach and *offer* identification credit for a settlement reached through ADR.

Section IV.A. also states, "[t]he status of settlement agreements occurring after an investigation is completed but prior to an NOV being issued will be established as part of the negotiation between the parties." *Id.* This, too, is problematic. We infer that a settlement prior to an OI investigation will not count as an enforcement case because an OI investigation simply is a way to obtain facts upon which the decision whether to pursue enforcement action will be based. It does not necessarily translate to the issuance of a NOV. Thus, if an OI investigation has been completed, but a NOV has not yet been issued, logic would seem to dictate the same result in that case. To express this another way, it is not the initiation or even completion of an OI investigation that is determinative of whether enforcement action will be taken; it is the issuance of an NOV that characterizes an "enforcement case".

In addition, allowing the status of settlement agreements "to be negotiated by the parties" unnecessarily adds an issue to the negotiation on which there is likely to be a stalemate. One can project with reasonable confidence that licensees are likely to believe a settlement before a NOV should not be counted as an enforcement case and the enforcement staff is likely to take the opposite position. Making an ADR settlement potentially count against the licensee in the future may also prove to be a disincentive to use the ADR process at a later juncture.

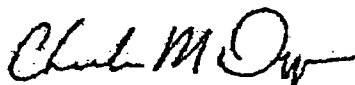
The second issue the NRC should reconsider is the issuance of a press release when a settlement is reached through ADR after the conclusion of the OI investigation. Given that a confirmatory order itself will be made public, the issuance of a press release is of questionable value. Further, it has the potential to reinvigorate the difficult issues resolved by the parties, and it actually may have a chilling rather than an ameliorative effect on the workplace. As the confirmatory order will be published as the Federal Register notice, there can be no argument that eliminating the press release would somehow make settlements secret. Note also that the industry's objections to the issuance of a press release are neither new nor confined to ADR settlements. We believe that issuance of a press release in various contexts in enforcement is counter-productive as it tends to elevate--in the eyes of the public--an issue that has been resolved to the satisfaction of the parties involved and the NRC, all of whom have greater knowledge of the facts than is usually communicated in a press release.

Ms. Annette Vietti-Cook
May 20, 2004
Page 4

In conclusion, despite the two concerns described above, the industry believes that the opportunity for ADR has the potential to avoid some of the problems that licensees and other stakeholders have identified over the past five years with respect to the agency's handling of discrimination and wrongdoing cases. The industry appreciates the Commission's initiation of an ADR process and will provide feedback when the NRC considers establishing the program as a permanent part of the enforcement process.

If you have questions about the industry's views or would like to discuss them further, please contact me or Ellen Ginsberg, NEI Deputy General Counsel, at (202) 739-8140 or ecg@nei.org.

Sincerely,



Charles M. Dugger
Vice President, Nuclear Operations
